

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

ACEC SUIT NO. 4 OF 2018.

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

VERSUS

BOB KEPHAS OTIENO.....1STDEFENDANT/RESPONDENT

EVELINE AWINO OGUTU T/A

NYANGUME ENTERPRISE.....2NDDEFENDANT/RESPONDENT

RULING

1. The Applicant a body corporate established under section 3 of the Ethics & Anti-Corruption Commission Act 2011 ("EACC Act") whose mandate under section 11(1)(j) of the EACC Act is to institute and conduct proceedings in court for the purpose of the recovery or protection of public property filed a plaint dated 19th March 2018 against the respondents seeking recovery of public property belonging to Homa Bay County to the tune of Kshs. 26,272,460.00/=. Simultaneously with the plaint, the applicant also filed a Notice of Motion application under Order 40(1) and Order 51(1) of the Civil Procedure rules in which they seek the following orders as against the respondents.

1. Spent

2. Pending inter partes hearing and determination of this application, the defendants by themselves, their agents, servants and employees or any other person whatsoever be restrained from alienating, wasting, transferring or in any other way dealing with the monies in the following accounts:-

1. Account No. 0980269442940 held at Equity Bank, in the name of the 2nd Respondent.

3. Pending inter partes hearing and determination of this suit the Defendants by themselves, their agents, servants and/or employees or any other [person whatsoever be restrained from withdrawing funds, transferring, disposing or in any other way dealing with funds held in the bank accounts listed in prayer (2) above.

4. The costs of this application be provided for.

2. The respondents on their part have also filed a Notice of Motion application dated 20th April 2018 under Article 10, 25, 47 and 251(1) of the Constitution of Kenya seeking:-

a) THAT the plaint filed by the Respondent in ACEC Suit No. 4 of 2018 be struck out for being in violation of section 35 of the Anti-Corruption and Economic Crimes Act requiring the Commission to produce a report of the investigations.

b) THAT the plaint and statement issued by the Applicant to the Respondent during the course of criminal investigations be struck out for being in breach of the Right against self-incrimination and as a result against the right to a fair hearing.

c) THAT the plaint and all accompanying documents thereto be struck out as having been improperly or illegally filed or obtained.

d) THAT the costs of this application be provided for. Both applications were heard simultaneously. I will deal with the application dated 19th March 2018 first.

3. The application is premised on the grounds on its face thereof and supported by the supporting and further affidavit of **Willy Mutuku** an investigator with the Ethics and Anti-Corruption Commission, sworn on 19th March and 7th June 2018 respectively. He investigated allegations of embezzlement of funds in the County Assembly of Homabay. The respondents for no work done. Their investigations established that the 2nd respondent is a wife to the 1st respondent who is the clerk to the County Assembly of Homabay. They believed that he largely influenced the transfer of money into the 2nd respondent's account, by authorizing the same with full knowledge that the 2nd respondent had not offered any services to the said County Assembly. He produced a copy of the payment schedules from the County

Assembly to Equity bank and 1st respondent's Declaration of Income, Assets & Liabilities form showing the 2nd respondent as his wife **(WM1(a) &(b))**.

4. That the 2nd respondent operated a sole proprietor business in the style of Nyangume Enterprise registered on July 17th 2013 vide registration number BN/2013/228656 located on plot No. C192 State House Road, Varsity Plaza Kisumu. It deals in computer business as evidenced by a copy of a letter from the Registrar of Companies dated 17/3/2017 **(WM2)**

5. Their investigations further revealed that despite the 2nd respondent being legally restricted by law to do business with the County Assembly of Homabay, she received a staggering Kshs. 26,272,460/= for no work done through her business A/C NO. 0980269442940 held at Equity Bank Homabay Branch within a period of six months running from 18/8/2016 to 26/1/2017 as evidenced from a copy of Nyagume bank statement. **(WM3)**.

6. Subsequently, on 28th June 2017, the applicant sought and obtained preservation orders for six (6) months in respect to Kshs. 636,200/= held in account Number 0980269442940 at Equity bank in the name of the 2nd respondent. The said preservation orders were extended for a further period of 3 months on 22nd December 2017 by the Homa Bay High Court in **Miscellaneous Application No. 8 of 2017 Eacc v Bob Kephass Otieno & another** pending completion of investigations as evidenced by copies of the High Court Order **(WM4 (a) & (b))**.

7. He explained that this suit and application were filed on 19th March 2018 before the expiry of the preservation orders on 21st March 2018. That the applicant is reasonably apprehensive that the respondents would seek to dispose off or transfer all or part of the monies listed in the present application in order to frustrate any decree that may be passed against it.

8. The application was opposed by **Eveline Awino Ogutu** the 2nd respondent through her replying affidavit sworn on the 30th May 2016. She confirmed being the proprietor of Nyangume Enterprise registered vide business registration no. BN/2013/228656. She termed the instant application by the applicant as misconceived and ill advised. It was her case that indeed on numerous occasions, she had applied for tenders at the County Assembly of Homa Bay and succeeded through a competitive procurement process and attached copies of minutes of various Tender Committee meetings **(EAO1)**.

9. She explained that all payments made by the County Assembly to her were in respect of goods delivered or services provided by her. She contended that the applicant's application was based on presumptions and baseless allegations as they seek to restrict her business affairs and they were prejudicial to her legitimate economic interests.

10. She stated that this being a civil suit, the applicants have not met the requisite threshold of proof of corrupt conduct in praying for preservation orders as both the application and affidavit do not demonstrate *a prima facie* case against her as alleged. She contended that she had always co-operated with reasonable requests for investigations into allegations of any criminal conduct. It was however her position that the applicant is not deserving of the orders sought. That there was sufficient ground to vary or set aside the preservation orders issued by this court.

11. In a further affidavit dated 7th June 2018, Willy Mutuku averred that they applied for search warrants on 1st March 2017 to search the offices and premises of some of the Homa Bay County Assembly officials vide Homabay Chief Magistrate Misc. Applications No. 9,10 and 12 of 2017 **(WM5(a)-(c))**.

12. He explained that investigations in the subject matter have been on - going since 1st March 2017, and what the outcome was. He also outlined the steps taken to file for preservatory orders before the High Court Homabay. He added that the said orders were granted in the interim by the court.

13. He produced a copy of the daily nation extract of 10th July 2016 showing an advert by the Homabay county Assembly for prequalification of suppliers and service providers for supply of goods and work (WM9). He averred that the 2nd respondent had not shown that she ever applied for this tender. Secondly that this tender was for a specialized category of persons as per the National Policy of reserving 30% tenders for special groups. That the 2nd respondent had not shown that her business fell within that special category. All she produced were copies of tender committee minutes; inspection and acceptance certificates for various tenders (EAO1 and EAO2), which were not equivalent to the certificate from the National treasury in respect to such tenders.

14. He further explained that among the documents recovered by the applicant were prequalification registers, tender registers and quotation registers covering the financial years 2015-2017 within which the 2nd respondent is alleged to have tendered for the supply of goods and services. In contrast, he averred that the 2nd respondent's business did not appear in the tender or quotation registers of the Homabay County Assembly hence she could not possibly have done business with the said County Assembly as evidenced by copies of the pre-qualification, tender and quotation registers **(WM10(a), b & c** for financial years 2015-2017.

15. He explained that provision of pest control and fumigation services was not advertised for prequalification under the service provision category by the Homabay County Assembly as allegedly provided for by the 2nd respondent under reference No. HBCA/20/2/1/2015/2016. The tender No. 21 as per the Pre-qualification tender notice in the above attached newspaper was for the maintenance of local area network referenced as HBCA/PR/20/2015-2017. In a nutshell it is the applicant's case that the 2nd respondent did not supply any goods or render services as per the advert by the Homabay County Assembly.

16. That during the 2015-2017 financial year, Mr. Titus Okore was the head of the Procurement department at the County Assembly during the period the 2nd respondent allegedly won tenders in the County Assembly. The said Titus did not however appear in any procurement by the 2nd respondent nor give his professional opinion in regard to any goods or services allegedly provided for by the 2nd respondent. He

produced Mr. Titus Okore's appointment and confirmation letters (**WM11 (a) &(b)**).

It is thus the applicant's contention that all the alleged inspection and acceptance certificates (EAO2) clearly indicate a huge variance in the dates within which the alleged contracts were dated and actual delivery of goods and services made after payment of the same making it a meaningless exercise.

17. It was thus the applicant's case that the 2nd respondent has not demonstrated that the alleged goods supplied and delivered by her were indeed received by the person in charge of the store at the Homabay county assembly. He thus, termed the tender minutes and documents annexed by the 2nd respondent in her replying affidavit as an afterthought and not a true reflection of the procurement department of the County Assembly of Homabay.

THE RESPONDENTS APPLICATION.

18. The respondents application sought the following prayers:-

a) THAT the plaint filed by the respondent in ACEC Suit No. 54 of 2018 be struck out for being in violation of section 35 of the Anti- Corruption and Economic Crimes Act requiring the Commission to produce a report of the investigations.

b) THAT the plaint and statement issued by the Applicant to the Respondent during the course of criminal investigations be struck out for being in breach of the right against self incrimination and as a result against the right to a fair hearing.

c) THAT the plaint and all accompanying documents thereto be struck out for having been improperly or illegally filed or obtained.

d) THAT the costs of this application be provided for.

19. The above application was premised on the supporting affidavit of **Eveline Awino** (the 2nd respondent herein) averring that she received numerous invitations from the applicant's (Kisii Branch) to make a statement ostensibly for the purpose of criminal investigations with respect to allegations of fraud concerning the Homabay County Assembly. However, she contended that she was not informed that the statement she was making was for the purpose of criminal investigations with respect to allegations of fraud concerning the Homabay County Assembly, or that herself.

20. Subsequently, the applicant wrote to her (EAO1) on 7th March 2018 demanding that she pays Kshs. 26,272,460.00 allegedly obtained from the County Assembly of Homabay. Thereafter, the applicant requested that she drafts a further statement as investigations were still ongoing. Her former advocates, MMA Advocates LLP, wrote to the applicant (EAO2) on 15th March 2018 requesting that the applicant gives her time to complete her examinations. That she undertook to assist the applicant in conducting the investigations from the onset and committed to continue doing so.

21. She further stated that the civil proceedings in ACEC Suit No. 4 of 2018 came as a surprise since she was not informed that the applicant intended to institute civil or criminal proceedings against her. It was therefore her case that the applicant had a duty to inform her of her right against self incrimination which was not done. Further that the applicant has an obligation to tender a report to the DPP after a successful completion of investigations. She termed the proceedings instituted by the respondent an abuse of the court process as the same were instituted based on incomplete criminal investigations.

22. The application was opposed by the applicant through **Willy Mutuku** an investigator with the commission vide his replying affidavit sworn on the 7th June 2018. He averred that the suit herein is of a civil nature and a report to the DPP as per section 35 of the Anti-Corruption and Economic Crimes Act 2003 only applies to matters of a criminal nature and not to civil suits as the one herein. In addition to this, he averred that the applicant is statutorily mandated to institute recovery suits under section 11 of the Ethics and Anti-corruption Commission without seeking recommendation from the DPP. That all the documents attached to the plaint including: payment schedules from Equity Bank, the 1st respondents wealth declaration form, letter from the Registrar of Companies and the respondents bank and recorded statements together with the court's orders were all properly and legally obtained.

23. He contended that all procedures were followed in obtaining documents as seen vide payment schedules.

24. He stated that the respondent appeared before the applicant on 23rd March 2017 for interview and statement recording but since she was not ready, the same was mutually deferred (WM8 (a) & (b) to 27th March 2017 upon her request. Consequently, on 27th March 2017, the 2nd respondent appeared before the applicant and her statement was voluntarily recorded. She was neither intimidated or forced to give her statement in contravention of the law.

25. He further averred that at all material times when the 2nd respondent appeared before the applicant for interview and statement recording including the 23rd March 2017, she was accompanied by her legal Counsel(Mr. Erick Otieno Ojuro, of Otieno, Yogo & Ojuro advocates) hence, her constitutional rights could not have been breached. To support this, a copy of the applicant's visitors book (WM9) produced showed that both the 2nd respondent and her counsel were at the applicant's offices in Kisii on 27th March 2017. Therefore it was the applicant's contention that the 2nd respondent's statement was obtained voluntarily and without breach of her rights as the same was done in conformity with provisions of the law.

26. In response to paragraph 2 of the respondent's application, he stated that the allegations were for loss of money through fraudulent means

and at no time was the 2nd respondent informed that the investigations were purely for criminal purposes. The result of the investigation would determine whether the case would be civil or criminal. It was the applicant's case that civil suit ACEC No. 4 of 2018 was procedurally and legally filed before a court of law upon completion of the investigations.

27. In respect to the plaintiff's application dated 19th March 2018 Ms Amojong submitted that investigations through a letter from the Registrar General (companies) revealed that indeed the 2nd respondent registered a business in the name and style of Nyangume Enterprise on 17th July 2013 vide registration No. BN/2013/228656 dealing in computer business. The business was a sole proprietor hence fully managed by the 2nd respondent.

28. That, Investigations also revealed that the 2nd respondent is a wife to the 1st respondent, the clerk of the Homabay County Assembly. It was counsel's submission that being husband and wife, the 2nd respondent herein was legally barred from doing business with the county assembly of Homabay as it would raise conflict of interest. However, despite this being the case, the 2nd respondent as established from the bank statement of her business, received millions of monies for no services rendered to the county assembly through her business account no. 0980269442940 held at Equity bank.

29. Counsel further submitted that from the inventories of the recovered items/documents during the search conducted by the applicant at the Homabay county assembly office, several files of the businesses, companies that conducted businesses with the County Assembly were recovered. There was however no trace of a single sheet of paper of Nyangume enterprise retrieved despite the alleged award of various tenders.

30. She submitted that the 1st respondent was the accounting officer and the one in charge of approving all payment. In spite of all this and with full knowledge that Nyangume Enterprise belonged to his wife, he went ahead to approve millions of public money to the wife for no services rendered totaling to Kshs. 26,272,460/= within a period of five months as clearly reflected in the 2nd respondent's business' bank account through the following transactions.

No.	Transaction Date	Amount
1	18/8/2016	Kshs.4,000,000
2	25/8/2016	Kshs. 1,240,000
3	9/9/2016	Kshs. 2,200,000
4	17/10/2016	Kshs. 2,000,000
5	21/10/2016	Kshs. 4,000,000
6	18/11/2016	Kshs.2,500,000
7	7/12/2016	Kshs. 5,532,460
8	21/12/2016	Kshs. 3,000,000
9	26/01/2017	Kshs. 1,800,000
	TOTAL	Kshs. 26, 272,460/=

Counsel further submitted that some of the money received by the 2nd respondent was transferred to the 1st respondent; I.e on 20/8/2016 Kshs. 600,000/= and on 05/11/2016 Kshs. 150,000/= respectively.

31. On the respondent's application dated 20th April 2018 counsel submitted that the suit herein is properly instituted by the respondent which is a statutory body established under **article 79 of the Constitution, 2010**. That **Section 11** of the Ethics & Anti-Corruption Commission gives additional functions to the Commission and specifically **subsection (k)** states that the commission shall;

“institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures”

According to counsel, the language of the section is clear and no report or recommendation is required from the Director of Public prosecutions (DPP) before the commission institutes a recovery suit like the one herein.

32. M/s Amojong contended that all the annexures accompanying the plaint were documents legally and procedurally obtained contrary to

the allegations by the Defendant/ Respondent. She went on to submit that the statement recorded from the 2nd respondent after an interview was recorded by her voluntarily. That all along her advocate was present and there was no way her rights could have been breached in the presence of her counsel. It was the counsel's submission that the said statement was recorded professionally without undue influence, intimidation or in contravention of any written law. That the interview and statement recording was in accordance with **Article 47 of the Constitution** on fair administrative action and at no point was the 2nd defendant/applicant informed that the investigations were purely criminal as per the interview notice sent out.

33. Counsel relied on the following provisions to argue the Plaintiff/Applicant's case:

Section 26(1) of the Anti Corruption and Economic Crimes Act which provides:

(1) If, in the course of investigation into any offence, the Secretary is satisfied that it could assist or expedite such investigation, the Secretary may, by notice in writing, require a person who, for reasons to be stated in such notice, is reasonably suspected of corruption or economic crime to furnish, within a reasonable time specified in the notice, a written statement in relation to any property specified by the Secretary and with regard to such specified property—

(a) enumerating the suspected person's property and the times at which it was acquired; and

(b) stating, in relation to any property that was acquired at or about the time of the suspected corruption or economic crime, whether the property was acquired by purchase, gift, inheritance or in some other manner, and what consideration, if any, was given for the property.

34. She therefore submitted that the allegation by the 2nd defendant that her statement was self-incriminating is a fallacy as she did not through her statement of defence and affidavit sworn on 25th May 2018 deny that she had conducted any business or received money from the Homabay County Assembly. That the same was not in any event rebutted with supporting evidence. On Article 50 of the Constitution she said the same provided for fair hearing while sub article (2) clearly enumerated the right of an **accused** person during trial. It was her contention that Article 50 of the constitution and specifically sub article (2) refers to criminal and not civil matters.

35. Mr Nyaribo for the 2nd defendant submitted that there was no obligation placed on the plaintiff to make a report on the findings of any criminal conduct on the part of the applicant before lodging any charges or instituting proceedings. Counsel further submitted that the claim instituted against the defendant is based on criminal allegations that should not be interrogated in a civil suit as they would affect the ongoing criminal investigations against the defendant.

36. Counsel contended that the failure by the plaintiff to issue an official report in line with section 35(1) of the Anti-Corruption and Economic Crimes Act on the investigations in respect to the defendant clearly showed that the plaintiff has not concluded the investigations into the alleged corruption/fraud on the part of the defendant. It was counsel's submission that the plaintiff neglected to inform the defendant that the statement made would be used in civil or criminal investigations which was clearly against the provision of Article 50(2) (I) of the Constitution of Kenya. Thus it was counsel's submission that the conduct of the investigations was done without due regard to the Constitutional rights of the defendant and the same were tainted with malice or ill-will and the same should be struck out from these proceedings.

37. He relied on the case of **Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another [2006]eKLR Misc. Civil Application No. 54 of 2006** where the court outlined three principles to be observed before issuing temporary orders stating that in a prima facie case:-

“the privilege against self-incrimination and the right of silence are the two rights which are internationally recognized as being at the heart of a fair trial that without the availability of the right to silence and privilege against self-incrimination, at the investigation stage, the ensuing trial cannot be fair, as guaranteed under section 77(1) and 77(2) (a) of the Constitution, that rights declared will be lost in reality.

DETERMINATION

38. I have considered the application by the applicant dated 19th March, 2018, the affidavits, annexures, submissions and authorities herein and the application dated 20th April 2018, the affidavits, annexures, submissions and authorities herein. I find the following issues to fall for determination:

i.whether the plaintiff/applicant violated section 35 of the Anti-Corruption and Economic Crimes Act?;

ii.whether the documents accompanying the plaint were illegally obtained by the plaintiff/applicant?

iii.whether the plaintiff/applicant failed to inform the respondent her right against self- incrimination and whether the statement issued by the applicant should be struck out?

iv.whether the Plaintiff/Applicant has satisfied the conditions for issuance of an injunction.

39. All the first three issues relate to the application by the 2nd defendant dated 20th April 2018. Section 11 (i)(j) of the Ethics and Anti Corruption Commission provides:

(i) subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and

(j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

It is also clear that no report or recommendation is required from the DPP before the Commission institutes a recovery suit over which it has mandate under section 11(i)(j) of the EACC Act.

40. In contrast Article 157(6) of the Constitution gives the DPP state powers to:

(a) Institute and undertake criminal proceedings.

(b) Take over and continue any criminal proceedings.

(c) Subject to clause (7) and (8) to discontinue at any stage before judgment is delivered any criminal proceedings. A reading of the above provisions of the law leaves no doubt that the DPP squarely deals with criminal related matters and plays no role in civil matters.

The rest of the allegations by the 2nd defendant can only be dealt with after a full trial. This is bearing in mind the two provisions cited above, and the fact that this is a civil suit for recovery of assets and not a criminal case. The application dated 19th of March 2018 is therefore dismissed.

Whether the Plaintiff/Applicant has satisfied the conditions for issuance of an injunction:

41. The principles for granting an interim injunction are well enumerated in the case of the case of *Giella –vs- Cassman Brown Co. Ltd & another (1973) EA 358*. In the said case, it was held that for one to succeed in an application for temporary injunction, one must demonstrate the existence of a *prima facie* case with a probability of success at the hearing; and that further it will not issue where damages is an adequate remedy; and that if the court is in doubt the matter will be decided on a balance of convenience.

42. It is not in dispute that the defendants/ respondents herein are husband and wife as per the 1st defendant/respondent's declaration of income, assets & liabilities form (WMI(b)). The 1st defendant /respondent being an accounting officer was in charge of approving all the payments. With full knowledge that Nyangume Enterprise belonged to his wife he went ahead to approve millions of public money to her for services believed not to have been rendered. The amount complained of is Kshs. 26, 272,460 which was paid within a period of five months as clearly reflected in the 2nd respondent's business bank account in nine transactions as shown at paragraph 30 of this judgment.

43. In addition to this, there is evidence that some of the money received by the 2nd defendant/respondent was transferred to the 1st defendant/respondent as follows:-

- On 20/8/2016 Kshs. 600,000/-
- On 15/11/2016 Kshs. 150,000/-

44. Furthermore, there are allegations of breach of the PPADA. That at the time the 2nd defendant/respondent was allegedly awarded all her tenders in the said County Assembly, one Mr. Titus Okore who was the head of procurement department did not participate anywhere in the process yet this was his docket. The truth or otherwise of all these accusations can only be ascertained after a full hearing.

45. From the above observation it is only fair and just that this case be heard fully and a determination made as soon as possible so that if there was any wrong doing, the subject County Assembly gets what is rightfully theirs unconditionally.

46. I am therefore satisfied that the plaintiff/applicant has made out a *prima facie* case to warrant the issuance of prayer No. 3 of the application dated 19th March, 2018 which I hereby do. There shall be an order for conservation of moneys held in Account No. 0980269442940 at Equity Bank, in the name of the 2nd defendant/respondent.

Final orders

47 (i) The application dated 19th March 2018 is allowed. Costs in the cause.

(ii) The application dated 20th April 2018 is dismissed. Costs in the cause.

Orders accordingly.

Dated, signed and delivered this 21st day of September 2018 in open court at Nairobi.

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HEDWIG I ONG'UDI

JUDGE